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December 18, 2002

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street SW, Suite TW-8B201
Washington, DC 20554

The Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 12th Street SW, Suite TW-8A302
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The Honorable Kathleen Q. Abernathy
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Federal Communications Commission
445 12th Street SW, Suite TW-8A204
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The Honorable Kevin J. Martin
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Federal Communications Commission
445 12th Street SW, Suite TW-8C302
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The Honorable Jonathan S. Adelstein
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Federal Communications Commission
445 12th Street SW, Suite TW-8B115
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Re: *Triennial Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338

Dear Mr. Chairman and Commissioners:

This letter is filed on behalf of AT&T in response to the *ex parte* letter jointly submitted by BellSouth, Qwest, Verizon, and SBC ("RBOCs") on November 19, 2002 ("RBOC Letter"). In that letter, the RBOCs contend that the Commission's forthcoming unbundling rules can and should preclude State commissions from playing any role in defining the network elements to which competitive LECs ("CLECs") may obtain access. The RBOCs primarily contend that if the Commission accepts the ILECs' claims and chooses to exclude one or more of the existing network elements from the national list, the Commission can and should preempt State commissions from continuing to require access to such elements at cost-based or other regulated rates under either state or federal law. Further, the RBOCs also contend that it would be bad policy and unlawful for the Commission to take advantage of the expertise of State commissions even for the task of applying the guidelines set forth in the Commission's regulations and determining whether

the factual preconditions to the availability of a particular network element have been satisfied in particular locales in a state.

These contentions are baseless, both as a matter of policy and a matter of law. States' demonstrated interest and experience in determining the conditions necessary to promote or preserve competition in all locales must be given great weight and deference if consumers, small business and investment are to benefit from the opening of local markets to competition.

State commissions have long been the stewards of local competition in their local markets. Building on one another's experiments and innovations, the State commissions have made enormous contributions to the national learning on what is necessary to eliminate the incumbent LECs' local monopolies and to bring competition to those local markets. Indeed, precisely because of their pivotal role in regulating local markets and the enormous expertise they accumulated over the years, Congress specifically provided that States should have a key role in implementing the ground-breaking provisions of the 1996 Act.

Moreover, the Commission itself has time and again turned to the States for support in assessing the complex legal and factual analyses that are required to understand how, where and under what circumstances local competition is developing. In virtually every one of its orders approving a § 271 application, this Commission has credited the pertinent State commission for its detailed factual record and analysis and for the measured actions the State commission had taken to ensure that competition is developing in its jurisdiction. *See, e.g.*, New York 271 Order,¶ 1, Kansas/Oklahoma 271 Order,¶¶ 2-4.

In the New York 271 Order, the Commission explicitly acknowledged that its decision represented "the culmination of extensive federal and state efforts implementing the Telecommunications Act of 1996" and was built on "the tireless efforts of the New York Public Service Commission, which has worked long and hard with Bell Atlantic and competitive LECs to ensure that local markets in New York are open to competition." In fact, the Commission heralded the New York Public Service Commission as "a leader in opening local markets to competition for over fifteen years," and praised New York as "a state with one of the most rigorous, expert commissions in the nation," citing a long litany of measures pioneered by the New York Commission to open its local exchange to competition and strengthen the competitive marketplace for local service. It was also concluded that "the dedicated work and unfailing persistence of the New York Commission" had produced "some of the most intensely competitive local exchange and exchange access markets in the nation." *Id.* ¶¶ 5-7.

But now that § 271 relief has been granted in most states, the RBOCs -- in a striking reversal of position -- would have the Commission turn its back on its experienced and dedicated State counterparts in favor of rules that would effectively federalize questions that are uniquely local in character. If the RBOCs' position on preemption were adopted, the States would be stripped of all authority to oversee local competition in their jurisdictions, their years of accumulated knowledge about conditions relevant to local competition would be jettisoned, and they would be relegated to the side-lines as impotent onlookers in any

effort to protect the competitive advances that they fought long and hard to achieve, and that this Commission repeatedly relied upon in approving the RBOCs' § 271 applications.

Aside from the fact that, as shown below, the RBOCs' proposal is bad law, it is also exceedingly bad policy. The 1996 Act was designed to build on the market-opening work that was already underway in the States, not to federalize that work by deploying broad rules wholly divorced from the local facts and circumstances unique to each State. Consistent with the decision in *USTA* v. *FCC*,[1] this Commission must conduct a fact-specific analysis of the myriad factors essential to the impairment analysis for individual network elements. All of these analyses are highly fact-specific and most require examination of discrete local facts that vary substantially across geographic regions. Accordingly, just as they were in the § 271 context, State commissions are in the best position to conduct these fact-intensive and market-specific analyses, both because they alone understand the competitive dynamics applicable in their jurisdictions and because they have in place the fact-gathering tools -- including the right to require discovery and cross-examination -- necessary to make such factual determinations. As a result, it is imperative that the Commission enlist the State commissions to assist it in the ongoing implementation of the Act

The importance of State participation in this process has been made clear through the flood of letters and comments filed in this record from State commissions and Commissioners from coast to coast.[2] Those comments make it abundantly clear that the State commissions are ready -- and fully-capable -- of meeting the continuing challenges required to foster the development of local competition in their localities and to assure that the telecommunications consumers in their jurisdictions receive better services and more choices at lower prices.

Importantly, a chorus of conservative and consumer voices have now joined these State representatives to urge that State commissions not be cut out of the process, denied the ability to exercise their own judgments, or otherwise reduced to fact-checking for this Commission. For example, a December 11 letter from the American Conservative Union ("ACU") to Chairman Powell expressed concern that local competition would be harmed if the Commission were to adopt rule changes that "prevent[ed] the states from using their judgment to establish policies they believe will best promote competition for local telecommunications services." In that context, the ACU correctly recognized that, "[b]ecause the state PUCs are closer to the specific needs of consumers – the states are best suited to implement the competitive promise and Congressional intent of the Telecommunications Act – that consumers should have a choice of local telephone companies."

Similarly, consumer groups from across the country have joined to send the same message: that it is vital that the Commission not make rule changes that undo the progress

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1 *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*").

2 More than eighty public service commissioners sent a letter to the FCC urging it to ensure that State commissions maintain local control over local competition issues.

made by the States over the past six years by undercutting local authority to adopt regulations that will open local telephone markets. As stated in the Consumer Federation of America's December 11, 2002 Press Release regarding its letter of the same date to Chairman Powell, "The FCC should not restrict the ability of state regulators to fulfill their Congressionally assigned role of keeping local markets open and wholesale prices fair and reasonable. Working together the FCC and state regulators can protect and enhance competition for the benefit of consumers."

For the first time in history, consumers are beginning to see the fruits of State efforts to open their local markets to competition. They are enjoying new choices, new services, and all the savings that competition generates. But these emerging consumer benefits could be jeopardized or squandered if State commissions' authority on local competition matters is undermined. Rather than preventing States from fully opening their local markets, the Commission must ensure that State commissions continue to play a meaningful role in developing local competition until it has become so entrenched that the incumbent LECs' market power is eliminated and the markets can operate without regulatory oversight.

Not only does sound public policy require that State commissions continue to play a significant role in opening local markets, but the law also requires it. Foremost, under the terms, structure, and history of the Telecommunications Act of 1996, the Commission's unbundling regulations define a national *minimum* set of network elements that CLECs have a federal right to obtain, and the Act expressly permits State commissions to define additional network elements under either federal or state law when they thereafter establish the interconnection agreements that actually define CLECs' access rights. The provisions thus expressly adopt what the incumbents now pejoratively refer to as a "one-way ratchet," but that is the rule that generally governs the legal effect of regulations adopted by federal agencies, particularly when, as here, the governing federal statute contains express "savings" clauses that preserve states' authority to adopt supplemental regulations. In fact, the provisions of the 1996 Act are so clear that the incumbent LECs *agreed* with AT&T and other CLECs on this point during the first six years of proceedings to implement the local competition provisions of the 1996 Act. The incumbents have now cynically changed their position because they understand that State commissions have detailed knowledge of relevant local conditions and strongly favor network element rules that will support competition and that the incumbents are urging the Commission to reject. But changes in regulatory philosophy do not alter the meaning of the 1996 Act provisions that make it explicit that the Commission's unbundling rules operate only to establish a national *floor* that preempts state laws that would have the effect of denying CLECs the rights to access the national minimum list of elements or that would otherwise impose barriers to competitive entry. The Commission's regulations cannot, however, operate as a *ceiling* as well as a *floor*.

All of the RBOCs' contrary arguments rest on a single fundamental error. They note that the *USTA* decision stated that unbundling is not "costless" because of its transaction costs and potential adverse effects on facilities investment and that the Commission's unbundling regulations require "tradeoffs" and a "balance" between costs and benefits of unbundling. In their view, it follows that if the Commission were to strike a "balance" that caused it to remove an element from the national list, the Commission's rules would

preempt States from striking a different "balance" and adopting interconnection agreements that grant CLECs greater unbundling rights. The incumbents here rely on judicial decisions that have given preemptive effects to federal regulations that were adopted under federal statutes that delegated ultimate lawmaking power to the federal agency and that were *silent* on the question of preemption. But incumbents ignore that Congress expressly departed from this general rule in the Telecommunications Act of 1996, for Congress here gave State commissions an express role in determining CLECs' unbundling rights and expressly provided that additional state requirements cannot be preempted if they are consistent with the Act's requirements and do not substantially prevent implementation of the Act's requirements and purposes. These provisions make explicit that States can adopt *additional* unbundling requirements that reflect a different balance between the costs and benefits than is reflected in the Commission's minimum requirements, and the lawfulness of State requirements is measured by their consistency with the requirements and purposes of the Act, *not* the purposes of this Commission's regulations or its current policy preferences. Moreover, it is clear from the Supreme Court decisions in *Verizon* and *AT&T v. IUB*, as well as from the D.C. Circuit's decision in *USTA,* that the measures that the States favor do not substantially prevent implementation of the Act's requirements or purposes.

In all events, there is absolutely no impediment to the Commission's adoption of regulations that explicitly leave to the States' judgment the additional unbundling requirements that might be necessary to foster competition in each State. Indeed, whatever the Commission believes about its authority to preempt additional State unbundling regulations, the Act expressly provides that the States are to apply the requirements of the Act and the criteria contained in the FCC's regulations in defining CLECs' unbundling rights in interconnection agreements; thus, the Act expressly authorizes the delegation that the RBOCs here oppose. Because the States alone have detailed knowledge of the microeconomic, engineering, and other facts that determine the extent of the impairment that would occur if access to particular UNEs were denied in particular local conditions, States are uniquely equipped to implement any "granular" unbundling rules that the Commission adopts.

Indeed, it is ironic in the extreme that the incumbents would now argue otherwise. As described above, in the proceedings under § 271 of the Act, the Commission – at the RBOCs' urgings – gave tremendous deference to the views of the State commission precisely because the State commission has superior knowledge of local conditions and of whether the BOC had implemented arrangements that assured that local markets in that state were genuinely open. Yet now that the RBOCs have obtained long distance authority in the great majority of the states in the nation and are near the point where they will have this authority everywhere, they now ask the Commission to adopt rules that would deny States *any* significant role in assuring that the very local competitive conditions that allowed long distance authority to be granted will continue to apply in the future and that remaining impediments to free and open local competition will be eliminated. These self-serving assaults on the Act, its terms and purposes -- and on simple common sense -- must be rejected.

The Statutory Framework And Its Regulatory Background. Any reasoned consideration of the question of the preemptive effect of the 1996 Act must address the

regulatory framework that was in place before the 1996 Act was passed and the ways in which the 1996 Act did and did not alter the States' preexisting authority.

Prior to the 1996 Act, State commissions had plenary authority over local and other intrastate telecommunications services. *See* § 2(b). Under state law counterparts to §§ 201-205 of the Communications Act, State commissions determined the services and facilities that would be offered either to end users at retail or to other carriers at wholesale and the extent to which incumbent LECs would be required to unbundle any particular services or facilities. The State commissions similarly regulated the rates for all local retail and wholesale services and facilities under whatever ratemaking standards they deemed appropriate under the applicable state law. Finally, the State commissions determined the extent to which rates charged to certain subscribers would be subsidized by rates collected from others. At the time of the 1996 Act, some states were opposed to local competition, but a number of other State commissions had begun to implement detailed schemes to introduce local competition, pursuant either to the state law counterparts to §§ 201-205 of the Communications Act or to specific state statutes that were enacted for this purpose.

In the 1996 Act, Congress adopted a federal scheme that establishes minimum obligations that preempt restrictive state policies. But the Act builds on the prior efforts of the States that were seeking to implement procompetitive measures, and the Act not only expressly relies on State commissions to implement the minimum federal mandates but also authorizes State commissions to establish and enforce additional requirements under state law so long as they do not operate as barriers to local competitive entry.

Several interrelated provisions of the 1996 Act establish this essential aspect of the Act, which the incumbents refer to as a "one-way ratchet." First, the only provision of the Act's local competition provision that expressly gives the FCC express authority to "preempt" state law is § 253(d). It bars only state laws that erect "barriers" to entry and has no application to state laws that go "too far" in granting unbundling rights. §§ 253(a)&(b). Second, §§ 251 and 252 of the Act clearly set up this Commission's regulations as minimum national floors that apply only if the parties *elect* to be governed by them, and they give State commissions authority to establish additional requirements under federal law in some circumstances and to establish additional obligations under state law in all circumstances.

In particular, while § 251(d) requires the Commission to adopt regulations to implement the unbundling and other requirements of § 251, the legal relationship between CLECs and ILECs is *not* ultimately governed by the regulations that the Commission adopts. Rather, they are governed by interconnection agreements (or statements of generally applicable terms and conditions) that are established and approved by State commissions under § 252, and State commission determinations that establish these agreements are reviewable on appeal only by an appropriate federal district court, not by the Commission. § 252(e)(6).

Under Section 252's terms, the *federal* standards that govern the establishment and approval of interconnection agreement vary, depending on whether the agreement (or a term thereof) is negotiated or arbitrated, but the same supplemental *state* law requirements apply to all agreements. If an agreement is negotiated, it is valid under federal law if its

provisions are nondiscriminatory and in the public interest, and it is irrelevant whether they also meet the requirements of § 251 or of the Commission's implementing regulations. §§ 252(e)(1)(A) & 252(a)(1). If an agreement is arbitrated, State commissions must apply the "requirements of section 251, including the regulations prescribed by the Commission under section 251." § 252(e)(1)(B). But whether an agreement is negotiated or arbitrated, the Act provides that a State commission can "establish[] or enforce[] other requirements of state law" in the interconnection agreements, and that the State commission's authority to apply other provisions of state law is "subject to section 253" and its ban on entry barriers – but not to any other provision of the Act. § 252(e)(3). Thus, even when Commission regulations had been invalidated on direct review by a federal court of appeals, courts have held that State commissions can impose the same or greater unbundling requirements under State law.[3]

In addition, § 251(d)(3) is entitled "Preservation of State Regulations" and specifically limits the Commission's ability to adopt regulations under § 251 that "preclude the enforcement of any regulation, order, or policy of a State." It makes explicit that state access and interconnection regulations *cannot* be preempted if they are "consistent with the requirements of this section [251]" (§ 251(d)(3)(B)) and do "not substantially prevent implementation of the requirements of this section and the purposes of this part [of the Act.]" (§ 251(d)(3)(C)). In contrast to other provisions of the Act, § 251(d)(3) measures the lawfulness of a state regulation by its consistency with *Act* and its purposes, *not* by its consistency with the Commission's regulations or policy preferences. *Compare* § 261(c) ("Nothing in this part precludes" state requirements that are "necessary to further [local] competition" as long as they are "not inconsistent with this part or the Commission's regulations to implement this part.").

Other provisions of the Act make it explicit that State commissions have the authority to adopt regulations to implement the requirements of § 251 of the Act so long as they are not inconsistent with this part of the Act. In particular, § 261(b) provides that "[n]othing in this part shall be construed to prohibit any state commission . . . from prescribing regulations . . . in fulfilling the requirements of this part [of the Act] if such regulations are not inconsistent with this part [of the Act.]" Finally, the States' authority to impose additional unbundling requirements is further confirmed by the provisions of § 271. That section provides that even if unbundled switching and other facilities are not designated as network elements under §§ 251(c)(3) and 251(d)(2), BOCs that obtain long distance authority must continue to offer them on an unbundled basis as *services*, and the rates for these unbundled switching and other unbundled services will be set by States whenever the services are used in connection with intrastate calls. *See* § 2(b). Further, to the extent delisted elements are provided as unbundled services under interconnection agreements, State commissions will set the rates under their authority to establish and approve interconnection agreements.

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[3] *U S West Communications, Inc. v. Hamilton*, 224 F.3d 1049 (9th Cir. 2000); *MCI Telecommunications Corp. v. U S West Communications*, 204 F.3d 1262, 1268 (9th Cir. 2000); *U S West Communications v. MFS Intelnet, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999).

Additional State Unbundling Requirements Are Not Preempted. Against this background, it is quite clear that the Commission's unbundling regulations establish minimum requirements that operate as a "floor" but not as a "ceiling." Even if the Commission were to ignore the clear factual evidence in the record and adopt the RBOCs' pleas to remove particular elements (*e.g.*, switching for customers served by voice-grade loops) from the national list, any State rules that require access to such elements continue to be valid and enforceable in those States. For although the Commission would then reach a different accommodation of the competing values, the State rule is not an entry barrier that violates § 253, but is entirely consistent with the Act's requirements and purposes of promoting local competition. Indeed, it represents a rule that a differently constituted Commission could have adopted on the record in this proceeding. The State rule will thus be valid irrespective of whether the Commission finds a lack of impairment for the reasons that the RBOCs assert (RBOC Letter at 1) or whether it finds impairment and nevertheless determines that access should be denied to foster other policies such as facilities investment (RBOC Letter at 3 n.1).

Preemption is always a question of congressional intent. An analysis of the preemptive scope of a federal statute thus must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose" (*Morales* v. *TWA*, 504 U.S. 374, 383 (1992)) and with recognition that there is a "presumption *against* the preemption of state police power measures." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) (emphasis added). Here, the terms, structure, and history of the Act foreclose the incumbents' preemption claim. Indeed, the principles and cases that they cite are wholly inapposite to the local competition provisions of the 1996 Act, for §§ 252(e)(3), 251(d)(3) and other savings provisions in the Act squarely bar the sweeping preemption that the ILECs urge. *See CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993) (savings clauses are "the best evidence of Congress' preemptive intent").

Foremost, when Congress intends federal regulations to operate as both a floor and as a ceiling, it knows how to do so. In such cases, Congress adopts preemption provisions that – in sharp contrast to the terms of the 1996 Act – expressly preclude states from imposing requirements that "differ" from, are "in addition to," or are not "identical" to, federal obligations. *See, e.g.,* Medical Device Amendments Act, 21 U.S.C. § 360k(a)(1) (no State may establish or continue in effect . . . any requirement which is different from, or in addition to, any requirement applicable under this chapter"); Federal Boat Safety Act of 1971, 46 U.S.C. § 4311 (preempting state "law or regulation . . . that is not identical to a regulation prescribed under section 4302 of this title"); Consumer Product Safety Act, 15 U.S.C. § 2075(a) ("no State or political subdivision of a State shall have any authority [to establish a safety requirement], unless such requirements are identical to the requirements of the Federal standard"); Federal Hazardous Substances Act, 15 U.S.C. § 1261 note (b)(1)(A) ("no State . . . may establish or continue in effect a cautionary labeling requirement . . . unless such cautionary labeling requirement is identical to the labeling requirement under 2(p) or 3(b)."

The decisive factor here is that Congress did not use any of these time-honored formulations in the 1996 Act. Instead, Congress did exactly the opposite. Rather than bar

States from enacting their own additional unbundling requirements or requiring them to be identical to the federal requirements, the 1996 Act expressly *permits* States to impose additional access obligations so long as they are "consistent" with the requirements of section 251 (§ 251(d)(3)(B)) and do not "substantially prevent implementation" of the "requirements" of that section or the "purposes of this part" of the Act (§ 251(d)(3)(C)). Moreover, the Act elsewhere expressly provides for the application of additional state unbundling requirements in the formulation of interconnection agreements, subject only to § 253's prohibition against state law entry barriers (§ 252(e)(3)). The Act thus outlaws only state measures that would preclude or substantially prevent the use of network elements to provide competing services, *not* provisions that would support the 1996 Act's goal of "eliminat[ing] the monopolies enjoyed by the inheritors of AT&T's local franchises . . . as an end in itself" and "giv[ing] aspiring competitors every incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Verizon Telephone Cos. v. FCC*, 122 S. Ct. 1646, 1654, 1661 (2002).

In particular, because the Supreme Court has held that state regulations are "consistent" with federal law so long as it is "possible to comply with the state law without triggering federal enforcement action" (*Jones v. Rath Packing*, 430 U.S. 519, 540 (1977), § 251(d)(3)(B) bars only state measures that would require incumbents to violate the Act or would legally preclude CLECs from obtaining elements and using them to provide competing services. Because § 251(d)(3)(C) must be construed in light of § 251(d)(3)(B) (*see Gustafson v. Alloyd, Co.*, 513 U.S. 561, 575 (1995)), the ban on state rules that "substantially prevent implementation" of the Act's requirements or purposes (§ 251(d))(3)(C)) can only apply to a state measure that, while not precluding compliance with unbundling requirements, would substantially burden an ILEC's ability to comply with the minimum unbundling requirements of the Act or would frustrate a new entrant's ability to obtain or use a network element that is required to be unbundled under federal law. Section 252(e)(3) reinforces this reading of § 251(d)(3), for it provides that, subject only to § 253's ban on state law entry barriers, additional state unbundling requirements can be established or enforced in State commission proceedings that approve negotiated or arbitrated interconnection agreements.

There is thus no question but that Congress intended to authorize additional state unbundling requirements. A state measure that adds an element (*e.g.*, unbundled switching) to a national list simply has no effect on the incumbent's ability to implement the minimum requirements of the Act, and it in no way prevents or frustrates the competition that these minimum requirements allow. Similarly, these measures do not operate as entry barriers, for they will not exclude entry by any efficient carrier. Rather, they will allow additional entry by firms that (due to hot cut, backhaul, and other economic barriers to this form of entry) will not provide service if they must self-provision switching. Such measures are thus plainly valid.

The RBOCs' contrary arguments are simply fallacious. Indeed, under their arguments, the provisions of §§ 251(d)(3) and 252(e)(3) would be nullities, contrary to the settled rule that state law savings clauses in federal statutes must be given independent meaning. Further, the incumbents' claims also rest on a view of the 1996 Act that has no support in *USTA,* and that was squarely rejected by the Supreme Court in *Verizon.*

The RBOCs' basic argument can be summarized briefly. They rely on the Supreme Court's and the D.C. Circuit's holdings that § 251(d)(2) of the Act imposes *some* limits on the Commission's designation of network elements and does not permit the Commission to order that a network element be unbundled merely because it is technically possible to do so and because it believes "the more unbundling the better."[4] However, contrary to the RBOCs' implications, neither the Supreme Court nor the D.C. Circuit addressed in any way the question of whether and under what conditions States may impose additional unbundling requirements under their expressly reserved authority. Rather, those decisions were limited solely to construing requirements which apply, by their terms, *only* to regulations that this Commission adopts and that establish minimum requirements that all State commissions must enforce in arbitrating interconnection agreements.

The RBOCs nonetheless rely on *USTA's* statements that unbundling imposes costs -- potential adverse effects on facilities investment and transaction costs of managing a sharing regime -- and that the FCC's determinations under § 251(d)(2) of the Act thus require a "balance" between the costs and benefits of unbundling. *USTA,* 290 F.3d at 425-26. The *USTA* court stated that an appropriate finding of "impairment" would automatically reflect a balancing of the competing interests (*id.* at 426-28), and the court further stated that when unbundling is ordered in the absence of a finding of impairment (which the court "assume[d]" that § 252(d)(2) permits), explicit "tradeoffs" need to be made between the benefits of unbundling and its costs. *Id.* at 425.

It follows, the RBOCs assert, that a Commission determination that certain network elements should be unbundled inherently represents a determination that greater unbundling is harmful and represents a "national policy choice embodied in section 251(d)(2)." RBOC Letter, p. 4. In particular, the RBOCs assert that if the Commission "excludes a UNE [*e.g.,* switching] from the unbundling list for failure to meet the federal 'impairment' standard" or otherwise, that "necessarily" represents a determination that the benefits of allowing unbundled switching does not outweigh the costs of potential adverse effects on investment in alternative facilities and that "*inclusion* of the UNE *on* the list would upset the balance" between the competing interests. RBOC Letter at 1. And the RBOCs urge the Commission expressly to so find in its forthcoming order and to attempt expressly to preempt additional state requirements that maintain unbundling requirements for switching or other elements that the Commission removes from the national list. *Id.* at 1-2.

In the RBOCs' view, the Commission's preemption of state rules that impose greater unbundling requirements will be lawful for the same reason that courts have upheld preemptive federal regulations that were adopted under other federal statutes. The leading case on which they rely is *Fidelity Fed'l Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 155 (1982), which, they assert, stands for a general rule that where a federal regulation "reflects a careful balancing of competing interests, the states may neither alter that framework nor depart from the federal judgment regarding the proper balance." RBOC Letter at 5. In the RBOCs' view, whenever a federal agency's rules represent its view as to

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4 *AT&T v. Iowa Utilities Bd.,* 525 U.S. 366, 387-92 (1999); *USTA v. FCC,* 290 F.3d 415, 423-28 (D.C. Cir. 2002).

how "congressionally mandated objectives would best be promoted" and a "reasonable accommodation of conflicting policies . . . committed to the agency's care by statute," state laws that impose additional requirements are preempted. *Id,* at 5-6, *quoting Geier v. American Honda Motor Co.,* 529 U.S. 861, 871, 881 (2000); *City of New York v. FCC,* 486 U.S. 57, 64 (1988) and *citing Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767 (1947); *United States* v. *Locke,* 529 U.S. 89, 111-113 (2000); *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151, 170 (1978).

But those decisions are wholly inapposite. Each arose under a federal statute that had committed the question of how the congressional objectives should best be promoted to the federal agency, for – in sharp contrast to the provisions of the 1996 Act – these other federal schemes contained *no* savings clauses that are remotely analogous to §§ 251(d)(3) and 252(e)(3). These decisions thus merely follow principles of "implied" conflict preemption that are applicable *only* when the governing federal statute does not have a relevant savings clause. For example, the federal statute at issue in *de la Cuesta* did not include *any* savings clause, let alone one that expressly precluded the agency from preempting enforcement of state regulations. Indeed, the Court there observed that "it would have been difficult for Congress to give th[at federal agency] a broader mandate" to preempt. *de la Cuesta,* 458 U.S. at 161. Similarly, the statute at issue in *Bethlehem Steel* did not include any savings clause, nor was there any relevant savings clause in *City of New York,* which held that the 1984 Cable Act did not deprive the Commission of its preexisting authority to adopt national technical standards. *Ray* and *Locke* both arose under the Ports and Waterways Safety Act of 1972, which contained a narrow safety clause that permitted states to impose higher equipment or safety standards "for [land] structures only," and which was held to create "field pre-emption" with respect to state regulation of ship design and construction. In *Geier,* the statute contained a sweeping express preemption clause invalidating any state standards that are not "identical" to DOT's safety standards and a "saving" clause providing that compliance with DOT safety standards does not "exempt" any person from liability under common law. The Court (by a vote of 5-4) reconciled these inconsistent provisions by holding that DOT safety standards would have preemptive effect in common law tort suits when, but only when, the agency regulations intended to establish a ceiling as well as a floor. 529 U.S. at 869-870.

Because the 1996 Act expressly preempts only state entry barriers and because § 251(d)(3) expressly saves state unbundling regulations that do not substantially prevent implementation of the Act's requirements or purposes, it is perfectly clear that the mere fact that the Commission may strike a particular balance between competing values in adopting its unbundling rules under § 251(d)(2) cannot establish that state rules that adopt greater unbundling requirements are preempted. All regulations, be they state or federal, require striking a "balance" and making "tradeoffs" between costs and benefits. When there is no savings clause, the balance struck by the federal agency can be preemptive and can preclude a state from adopting greater requirements by striking a different balance. By contrast, where, as here, there is a savings clause expressly authorizing additional state regulations, the regulations that the federal agency adopts based on its view of the appropriate "balance" can do no more than establish minimum federal requirements and set a floor below which no state may go. But individual states may then exceed that floor if they make a different "tradeoff" between the competing values, or if they reasonably give weight to other factors

that the federal agency did not address. Because § 251(d)(3) and § 252(e)(6) squarely establish that Congress intended to allow the enforcement and establishment of some state rules and policies that impose additional unbundling requirements, it is quite clear that the mere fact that the Commission's rules represent a "balance" cannot mean the preemption of State rules imposing greater unbundling requirements because they strike a different balance.

Indeed, if the incumbents' contrary arguments were accepted, it would mean that the various savings clauses adopted by the 1996 Act would be nullities. But that is flatly impermissible. In one of the Supreme Court decisions on which the RBOCs rely – *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000) – the Supreme Court made clear that where Congress includes an express savings clause in a statute, that clause must be construed to have independent, operative effect. In that case, the Court held that despite the fact that the underlying statute contained a broadly worded *express* preemption clause, the Court would still construe a separate "saving provision" so that it would not be "render[ed] ineffectual" and would have substantive significance. *Id.* at 868, 870. Here, the only way to give independent effect to §§ 251(d)(3) and 252(e)(3) is to acknowledge that individual State commissions are free to impose additional unbundling requirements on their incumbent LECs based on their different perceptions of the appropriate tradeoffs.

Indeed, the RBOCs appear to acknowledge that they must advance an interpretation of § 251(d)(3) that gives it independent significance, but their attempt to do so merely underscores the bankruptcy of their claims. They argue (by relying on an off-hand statement in a footnote in a prior Commission Brief) that section 251(d)(3) is only an "anti-field-preemption provision." RBOC letter at 4. But that contention is baseless. Even if § 251(d)(3) had not been included in the Act, no plausible argument could have been made that the local competition provisions of the 1996 Act occupy the entire field of local competition. Field preemption exists only where the "scheme of federal regulation [is] . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *English* v. *General Elec. Co.*, 496 U.S. 72 (1990). In the case of local telephony, no such claim could have been made even if § 251(d)(3) (and § 252(e)(3)) had not appeared in the Act, for there are many other provisions in the Act that flatly preclude any claim of field preemption. These provisions expressly provide that the Act cannot be construed to bar states from adopting additional regulations that are designed to promote local competition and that are "not inconsistent with the requirements of the Act or with the Commission's regulations to implement this part [of the Act]" (*see* § 261(c); *accord* § 261(b); *see also* § 2(b)). To treat § 251(d)(3) as a mere anti-field-preemption provision would thus render it redundant and ineffectual, contrary to the settled principles applied in *Geier*.[5] Accordingly, § 251(d)(3)

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[5] Indeed, it is ironic that RBOCs would acknowledge that § 251(d)(3) is *at least* an anti-field-preemption provision. The incumbents' argument that the Commission's UNE list represents both a "floor" and a "ceiling" – and that the States cannot order either more or less unbundling than the Commission – is tantamount to the claim that Congress occupied the field of UNE regulation, a claim that is precluded even on the

must be construed to put substantive limits on the Commission's authority to adopt preemptive state regulations and to preserve the authority of State commissions to impose additional unbundling requirements based on their views of the appropriate "tradeoffs."

The RBOCs dismissively refer to this reading of § 251(d)(3) as a "one-way ratchet." RBOC Letter at 3. But on *any* reading of the Act – including the one offered up by the RBOCs themselves – the Act's unbundling provisions do in fact create such a one-way ratchet. Because § 252(c)(1) requires State commissions, in conducting arbitrations, to "ensure that such resolution and conditions meet the requirements of . . . the regulations prescribed by the Commission pursuant to section 251," the RBOCs concede that the Commission's regulations operate as a "floor" below which States may not go. RBOC Letter at 3, 6. At the same time, unless § 251(d)(3) is an utter nullity, there must be additional state requirements that a State commission may impose and that the Commission may not "preclude" by regulation. There is thus no dispute that § 251(d)(3) creates a one-way ratchet; the only conceivable dispute could be over its scope.

In short, whatever else Congress might have meant by the phrase "substantially prevent implementation of the requirements of this section and the purposes of this part," § 251(d)(3)(C), it could not have been the preemption of additional state unbundling requirements because they "strike a different balance" than the one struck by the Commission. *Every* decision to regulate, or not to regulate, strikes a "balance" between the benefits to be obtained by regulation and the costs of potentially over-regulating. For this reason, any State's decision to impose additional obligations on incumbent LECs reflects a decision to "strike" a different "trade-off" from the Commission's. If this were a sufficient basis for the Commission entirely to preclude enforcement of state regulations, § 251(d)(3) would be at war with itself.

The RBOCs also note that § 251(d)(3) does not save state unbundling regulations that would "substantially prevent implementation" of the "purposes of this part [of the Act]." While they never make a coherent argument that additional state unbundling requirements violate the Act's purposes, the RBOCs appear to suggest that additional state unbundling will necessarily conflict with a "national policy choice embodied in § 251(d)(2)" of the Act. They appear to claim that additional state unbundling obligations cannot be valid under the Act unless they adhere to the standards of § 251(d)(2), or unless the State's unbundling requirements are ones that it would have been legally permissible for the Commission to adopt.

Any such argument fails for multiple reasons. Foremost, § 251(d)(2) is a procedural requirement that, by its terms, applies to the *Commission* when it adopts regulations to implement the unbundling requirements of § 251(c)(3), for it merely provides that when the Commission "determin[es] what [nonproprietary] network elements should be made available *for purposes of section 251(c)(3)*," it must "consider, at a minimum" whether new entrants will be "impaired" in providing service if access to the element is denied. Section 251(d)(2) makes absolutely no mention of the States, and it neither prescribes procedures

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RBOCs' reading of section 251(d)(3).

that State commissions must follow nor establishes specific factors that they must take into account when imposing access requirements pursuant to state law.

But the short answer to the RBOCs' suggestion is that a state rule that continues the existing national list of UNEs is entirely consistent with *any* statutory "purpose" that could be gleaned from § 251(d)(2)'s terms and the rest of the Act or from the judicial decisions that have interpreted them. For example, if the Commission were to exclude unbundled switching from the national list in some circumstances, that would represent, at most, a policy judgment by the Commission that, despite the unrefuted evidence of impairment that AT&T and others have submitted, the evidence should be deemed insufficient and access to that element should be denied in order to foster greater facilities investment. But a differently constituted Commission could look at the same evidence and permissibly reach the opposite conclusion. Thus, it is entirely consistent with the Act's terms and purposes for a State to make different factual or policy judgments based on its assessment of the evidence. That is particularly so because the record before the Commission focuses on generic conditions in the nation as a whole, and each State commission has access to evidence that is not available to the Commission: the facts of the actual local conditions that confront CLECs in the particular locales in each state.

In this regard, contrary to the RBOCs' rhetoric, no State has adopted a view that unbundling should be ordered whenever it is technically feasible on the theory that "more unbundling is better." States' unbundling requirements recognize, among other things, the cost and other practical disadvantages that CLECs inherently face in obtaining access to elements outside incumbents' networks, and where States have independently required access to the existing national list of UNEs it because they have adopted a balance of the competing factual claims and policy values that is entirely permissible under the Act's "impairment" and other standards, albeit one that is different from the one that incumbents have asked the Commission to make. The decisive factor, therefore, is that § 251(d)(3) makes the lawfulness of State decisions on access to UNEs turn on their consistency with the purposes of the Act, not on the purposes of the present Commission's regulations, its policy preferences, or the factual determinations that the Commission makes based on more limited national evidence of impairment that is itself conflicting. Under § 251(d)(3) and § 252(e)(3), additional state unbundling requirements cannot be preempted unless they constitute competitive entry barriers into local telephony markets that violate § 253 or otherwise represent "balances" or "tradeoffs" that are impermissible under the Act.

The RBOCs are thus reduced to manufacturing legal claims by stringing together out-of-context quotations of snippets from prior judicial decisions in a vain effort to claim that State rules that continue the UNE-platform would violate the Act's purposes. For example, they assert that § 251(d)(2) "requires 'the Commission' to enforce a 'limited standard,' *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 388 (1999), that prevents 'completely synthetic competition' from undermining 'incentives for innovation and investment in facilities.' *USTA,* 290 F.3d at 424." RBOC Letter at 3. They similarly assert that the courts have "squarely rejected" "a result that could create 'completely synthetic competition' in the short term, *USTA,* 290 F.3d at 424, at the expense of . . . facilities based competition in the long term." RBOC Letter at 2. But these decisions hold – at most – that effects on investment are a factor to be balanced, not a dispositive consideration. Moreover,

the Supreme Court has *rejected* any claim that the UNE-platform is "parasitic free riding" that violates the Act's purposes. Rather, it has held that it is both reasonable and permissible under the Act to adopt rules that decline to "risk keeping more potential entrants out" and that instead "induce them to compete in less capital intensive facilities with lessened incentives to build their own bottleneck facilities." *Verizon Telephone Cos. v. FCC,* 122 S.Ct. at 1672; *see also id.* at n. 27 (Act permits rules allowing entry by "hundreds of smaller" firms even when there are "large competitive carriers" who could construct alternative facilities.). This establishes that state unbundling rules that maintain the existing national list of UNEs are fully consistent with the Act's requirements and purposes, even if the Commission accedes to the RBOCs' claims that the certain elements should be removed from the list.

In short, § 251(d)(3) authorizes States to "strike" a different "balance" and to make different "trade-offs" than the one reached by the Commission, and States may impose UNE requirements that go beyond the list set forth by the Commission. To the extent that federal law imposes *any* limits on States' authority to add to the Commission's UNE requirements, it at most prohibits a State from striking a balance that falls outside the broad range of choices that the Commission could permissibly reach or that constitutes an entry barrier in violation of § 253. So long as a differently constituted Commission could lawfully choose, in the exercise of its discretion, to require that particular UNEs be made available, State commission decisions to require the same element or elements be made available cannot "substantially prevent implementation of the requirements . . . or purposes" of the Act.

Finally, these points are so clear that they previously were acknowledged by the RBOCs themselves, as well as CLECs. In this regard, the RBOCs' claim that AT&T has engaged in an "expedient about-face" is false. Since the passage of the Act in 1996, AT&T has consistently maintained that although the Commission "should identify a *minimum* list of network elements that incumbent LECs must offer," State commissions are free to add to the requirements imposed by the Commission. *Local Competition Order*, ¶ 234 (emphasis added) (citing AT&T comments at 3-18); *UNE Remand Order*, ¶ 154. The only entities that have made an "about-face" on this issue are the ILECs. In particular, back in 1996, when it then suited their purposes, USTA, BellSouth, and U S West (the former name of Qwest) each acknowledged that States could adopt unbundling requirements in addition to those that the Commission adopts. In fact, the incumbents then argued *against* "the Commission's identification of a minimum list of required network elements," on the ground that "national unbundling requirements would . . . retard the development of local competition . . . and curtail the incentives of incumbent LECs to develop new technologies and services." And in complete opposition to their current position, the ILECs argued that in order to preserve the ILECs' incentives to invest and to best promote local competition, "states must have flexibility to determine unbundling requirements that address state-specific concerns." *Local Competition Order*, ¶ 236 (citing BellSouth, US WEST and USTA comments). In the face of these facts, it is remarkable that the RBOCs would falsely accuse AT&T of changing *its* position on these matters. But the decisive factor is that the RBOCs' own former claims confirm that States have the authority to adopt additional unbundling requirements.

States Cannot Be Preempted From Regulating Rates For Unbundled Facilities and Services. The RBOCs' letter also asks the Commission separately to preempt State

commissions from regulating the rates for elements that the Commission removes from the national list, but that the incumbents either choose to offer on an unbundled basis or are compelled to offer under other provisions of the law. The impetus for this request is the provisions of § 271 that independently require BOCs that seek and exercise long distance authority to provide access to unbundled loops, switching, transport, and signaling, whether or not these are designated as network elements that must be made available under the provisions of §§ 251(c) and 252(d).[6] These provisions of § 271 underscore AT&T's demonstration above that greater unbundling requirements than those specified in the Commission's rules are fully consistent with the Act's requirements and purposes and that States therefore cannot be preempted from imposing such requirements.

However, the RBOCs' claim would be meritless even if the Commission could preempt the States from using their authority under state law to require ILECs to continue to provide access to network elements that the Commission has removed from the national list. For even if particular facilities are not available as *network elements* on an unbundled basis, State commissions have authority under the state law counterparts to §§ 201-205 of the Communications Act to order that use of particular facilities be offered on an unbundled basis as *intrastate services* and to set the rates for those intrastate services under whatever ratemaking method that the States deem appropriate under the applicable state law. The Supreme Court has held that the Commission cannot preempt State commissions from exercising this ratemaking authority by virtue of § 2(b) of the Communications Act (*see Louisiana PSC v. FCC*, 476 U.S. 355 (1986)), and there is no provision of the 1996 Act that could possibly deprive State commissions of this authority. *See AT&T v. IUB*, 525 U.S. 366, 378 (1999) (FCC's rulemaking authority over intrastate matters "extend[s] only to "the local competition provisions."). In this regard, a State's authority to regulate rates for intrastate services applies regardless of whether it has ordered the incumbent to offer the service or whether the incumbent has done so voluntarily in order to remain in compliance with § 271 or otherwise.

Indeed, one of the incumbent LECs (Qwest) admits this basic point in the separate *ex parte* that it submitted on November 21, 2002, entitled "Regulation of an Element Found No Longer to Meet Section 251's 'Necessary and Impair' Test."[7] There, Qwest acknowledges that if facilities are removed from the list of elements but are voluntarily offered by incumbents on an unbundled basis in order to satisfy the requirements of § 271, the Commission will have jurisdiction under §§ 201 and 202 to regulate the rates of any jurisdictionally interstate services under whatever ratemaking method the Commission

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6 *Compare* 47 U.S.C. § 271(c)(2)(B)(ii) (requiring "access to network elements in accord with the requirements of Section 251(c) and 252(d))" *with id.*, §§ 271(c)(2)(B)(iv)(v) & (x) (requiring nondiscriminatory access to unbundled loops, unbundled transport, unbundled switching and databases and signaling). *See also* § 160(c) (FCC "may not forbear from enforcing requirements of Section 251(c) on 271" until they are "fully implemented").

7 Letter To Marlene H. Dortch, Secretary Of FCC, from Cronan O'Connell, Vice-President-Federal Regulatory, Qwest, dated Nov. 21, 2002.

deems appropriate. The entire thrust of the Qwest *ex parte* is to urge the Commission to forbear from regulating the rates for these interstate services or to exercise minimum rate regulation. It necessarily follows that, in these same circumstances, State commissions will have jurisdiction to regulate the rates for the unbundled offerings to the extent that they are jurisdictionally intrastate, as virtually all local switching and other services are. Indeed, because the unbundled services that are offered to satisfy § 271 (or state requirements for intrastate services) are going to be used in conjunction with unbundled network elements that continue to be on the national list, they will have to be made available under interconnection agreements that the State commissions establish.

In all Events, The Commission Can And Should Delegate the Fact Finding Required To Make "Granular" Determinations To State Commissions. Finally, in addition to arguing that the Commission can and should preempt State commissions from imposing additional requirements under *state* law, the RBOCs argue that the Act prohibits the Commission from even delegating to State commissions the task of applying the guidelines in the Commission's regulations to the conditions applicable in particular local markets. The RBOCs argue both that the Act prohibits this delegation and that it represents bad policy. These contentions are self-serving nonsense.

First, the RBOCs' delegation argument is based on the notion that § 251(d)(2) requires that the Commission alone determine all the facts that will establish CLECs' right to obtain access to a particular unbundled network element. This is an unprecedented claim. Both the Commission's 1996 *Local Competition Order* and its 1999 *UNE Remand Order* expressly authorized State commissions not merely to determine if the conditions to the availability of elements that were on the national list had been satisfied in particular locales, but also to apply the Commission's "necessary and impair" standards to determine if *additional* network elements should be made available in their jurisdictions.[8] These delegations were never challenged on appeal, for the simple reason that the Act expressly authorizes them.

In particular, § 251(d)(2) does *not* require the Commission to decide all the facts that are preconditions to the availability of network elements. It merely adopts factors that the Commission must "consider" in adopting regulations to designate network elements for purposes of § 251(c)(3), and the Act's terms and structure make it explicit that the Act intends that State commissions will apply the criteria in the Commission's regulations in deciding whether particular network elements should be made available as a matter of federal law in that state.

In this regard, the incumbents are simply wrong in maintaining (RBOC Letter at 7) that there is no "express congressional authorization for a [delegation]" to the State commissions in this context. Two separate provisions of the Communications Act make clear that State commissions have the authority to implement § 251(c)(3). First, § 252(c)(1) states that in resolving an interconnection agreement arbitration, "a State commission shall ensure that such resolution and conditions meet the requirements of section 251, *including the regulations prescribed by the Commission pursuant to section 251.*" 47 U.S.C. §

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[8] *E.g.*, 47 C.F.R. § 51.317.

252(c)(1) (emphasis added). By its terms, this requires that State commissions make the factual determinations that establish a CLECs' right to obtain an element under the Commission's rules. Second, § 261(b) states that "[n]othing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or *from prescribing regulations after such date of enactment, in fulfilling the requirements of this part*, if such regulations are not inconsistent with the provisions of this part." 47 U.S.C. § 261(b) (emphasis added). Because State commissions have independent authority to prescribe and to apply their own network element regulations to "fulfill the requirements" of § 251(c)(3), States necessarily also have authority to apply the criteria in the regulations that the Commission adopts to the particular facts in each locale.

The RBOCs' claim that it would be "bad policy" to delegate specific factual determinations to State commissions is startling. Section 252 of the Act requires that State commissions formulate the interconnection agreements that actually govern the unbundling rights and duties of CLECs and ILECs precisely because Congress recognized that States have superior knowledge of the relevant local conditions. For this same reason, the Commission has, at the RBOCs' own urgings, given enormous deference to State commissions' views in determining whether BOCs have implemented arrangements that make their local markets open and thus meet the competitive checklist and public interest preconditions for a grant of long distance authority under § 271. And because the D.C. Circuit's *USTA* decision is being read as requiring the Commission to adopt unbundling rules that account for "market specific variations in competitive impairment" -- and because these variations depend on local conditions that are beyond any practical ability of the Commission to assess -- it is imperative that the Commission rely on State commissions to make the basic factual determinations that will determine whether network elements must continue to be available or not.

The point is underscored by the RBOCs' own advocacy in this proceeding. Rather than address the microeconomic, engineering, and other facts that exist at the level of local serving offices and that determine whether particular classes of customers can be served through alternative facilities, they have (1) asked the Commission to find a lack of impairment by relying on meaningless *national* statistics of switch and fiber deployment, which reflect, at most, that alternative facilities can be deployed to serve particular large customers in certain circumstances and (2) proposed triggers for delisting UNEs that are like those adopted in the *Special Access Pricing Flexibility Order* and that have nothing at all to do with whether alternative facilities actually exist or can be economically deployed in the particular locations and/or on the particular routes CLECs need to serve particular customers. This underscores that the only responsible set of "granular" unbundling rules are rules that rely on State commissions to apply the relevant criteria to the facts applicable to the particular local serving offices in their jurisdictions.

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For these reasons, AT&T respectfully submits that the Commission must reject the RBOCs' legal and policy arguments about the permissible and appropriate role of the States in applying the forthcoming unbundling regulations. The Commission should acknowledge

that even if it chooses to remove particular UNEs from the national list, States have the authority to require that those UNEs be made available under state law.

Very truly yours,